

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 16342  
ISSUED TO: Perry Stephen MANN

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2363

Perry Stephen MANN

This appeal has been taken in accordance with 46 U.S. Code 239(g) and 46 CFR 5.30-1.

By order dated 8 July 1982, an Administrative Law Judge of the United States Coast Guard at San Francisco, California suspended Appellant's Seaman's License for three months upon finding him guilty of misconduct. The specifications found proved allege that while serving as Operator on board the M/V CAPTAIN HORNBLOWER, under authority of the license above captioned, Appellant did on 16 and 17 February 1981, while carrying 66 and 48 passengers respectively between the hours of 1900 and 2300 each day, wrongfully operate said vessel, a non-Coast Guard certificated vessel, in violation of the provisions of 46 U.S.C. 390c(a). The hearing was held at San Francisco, California, on 2 March, 2 April, 7 April, 1 May, 7 May, 24 June, and 7 July 1981.

At the hearing, Appellant was represented by professional counsel, and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence eight exhibits and the testimony of two witnesses.

In defense, Appellant offered in evidence four exhibits and his own testimony.

After the end of the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been proved. He served a written order on Appellant, suspending license No. 16342 and all other valid licenses, documents, certificates, and endorsements issued to Appellant for a period of three months.

The entire decision was served on 13 July 1982. Appeal was timely filed on 28 July 1982 and perfected on 24 January 1983.

FINDINGS OF FACT

On 16 and 17 February 1981, Appellant was serving as Operator on board the United States M/V CAPTAIN HORNBLOWER and acting under authority of his license while the vessel was underway in San Francisco Bay. The M/V CAPTAIN HORNBLOWER is 57 feet long, less than 100 gross tons, and diesel powered. On 16 and 17 February 1981 it was registered in the state of California and did not have a U.S. Coast Guard certificate of inspection issued to it. It is leased and operated by Hornblower Yachts. On the evenings of 16 and 17 February, the vessel had been chartered by Gorman Publishing Co., of Chicago, Illinois, and there were, respectively, 66 and 48 employees and guests of Gorman Publishing Co. aboard.

Hornblower Yachts is in the business of providing vessels for pleasure cruises. In addition to the M/V CAPTAIN HORNBLOWER which it leases, it owns the M/V ADMIRAL HORNBLOWER. The M/V ADMIRAL HORNBLOWER is an inspected passenger vessel. Appellant, in his association with Hornblower Yachts, had acted as "captain" for both of these vessels. He testified that "the arrangement insofar as the charter party was concerned, was predominantly the same" for both vessels. However, the charter party for the M/V CAPTAIN HORNBLOWER is written as a bareboat charter because of its uninspected status. The charter parties for 16 and 17 February 1981 are consistent with this description and purport to be bareboat charters.

Appellant has worked for Hornblower Yachts and its predecessor, Hornblower Tours, for several years as a "captain" for its charter vessels. He does not consider himself to be an employee of the company as such, but an independent contractor. The charter forms and arrangements for 16 and 17 February were the same as Hornblower Yachts and Hornblower Tours had used during the time that appellant worked with them. Appellant was aware that there was some discussion with the Coast Guard regarding whether or not the bareboat charter arrangement was legitimate.

The following procedure was followed in assigning Appellant as "captain" for charter trips. He would contact Hornblower Yachts and ask what was available. They would then tell him what trips were open to him. After going through this procedure for the occasion in question, he was told that he was recommended as the "captain" for the evenings of 16 and 17 February. His reply was "Great; put me down." His next connection with the trips was to take the M/V CAPTAIN HORNBLOWER to Pier 39 on the evenings in question to meet the group which was to use the vessel. When he found them, he brought them aboard. It was here that he first met Mr. Harry Stagnito and Miss Peggy Petrovich, who signed the portion of the charter parties purporting to hire him as "captain," or anyone else from Gorman Publishing Co.

In addition to Appellant and the crew operating the vessel, there were caterers aboard, provided by Armature Incorporated, a subsidiary of Hornblower Yachts. The catering had been arranged by Hornblower Yachts.

The cruise departed Pier 39 on 16 February on schedule and was essentially uneventful. It returned around 2300. At that time, the Gorman party departed the vessel, the catering crew started cleaning up, and Appellant sailed the vessel back to Berkley, its base. Before Appellant departed the vessel, it was boarded by CWO 2 S. J. Allen, a Coast Guard Investigating Officer. He examined the charter party for that evening.

The events the following night, 17 February, were similar, except that the charter party had been changed somewhat. There was a longer form emphasizing the bareboat nature of the charter. Before the vessel left Pier 39 on 17 February, it was boarded by LT. D. C. Wilder, a Coast Guard Investigating Officer. At that time he charged Appellant with misconduct for carrying passengers without the proper certificate of inspection on both 16 and 17 February. The charges were served in the pilot house of the vessel after the people from Gorman Publishing had boarded the vessel, but before it left the pier. After charging Appellant, LT. Wilder left the vessel and Appellant took those aboard out as scheduled.

The record contains a document with the heading "Hornblower Tours," and indicating private party booking. This document gives some indication as to how cruises are handled. It lists the information for the tour on February 16, 1981. Among the things found on this document are the following. There is a large block of pre-printed information that states, in large boldface type, "Have a party!" and contains the information: "Tinkling pianos, broiled steaks, Irish coffees and singalongs. Attentive uniformed crew, the sights of the bay - these are yours aboard Capt Hornblower's big yachts." The following information relative to the booking on the 16th is on the form: "Day, date, hours, and number guaranteed February 16, 1981, 7-11 p.m., 55." "Yacht and crew engaged the yacht CAPTAIN HORNBLOWER Captain, First Officer, and Hostess." "Entertainment wished Cassettes." "Special requirements (food, bar, signs, flowers, cake, etc.) Four hour dinner cruise consisting of hors d'oeuvres, filet or seafood brochette, entree, salad, french ice cream sundaes, Irish Coffees, and a full bar provided at cost." "Comments: \$22.00/person + \$7/filet entry or \$5/seafood brochette. \$4/person for full bar at cost. \$125 San Francisco boarding fee. A \$300.00 deposit is needed ninety days prior to cruise date to confirm and hold the yacht for your party." The record does not contain such a document for the cruise on the 17th. It contains a similar document for a cruise on 22 January 1981 which is not the subject of the charges,

but does show the use of the same form for the M/V CAPTAIN HORNBLOWER for another cruise on that date.

The record contains a document titled "Bareboat Charter Agreement" with the name Hornblower Yacht and Coach Tours at the top. On its face, it is an agreement for the bareboat charter of the M/V CAPTAIN HORNBLOWER for 16 February 1981. The top two-thirds of the document is an agreement for the charter of the vessel; the bottom one-third is titled "Crew Hire and Expense Document" and purports to retain the services of Appellant as "captain." Both parts of this agreement were dated and signed on 16 February 1981. The record also contains a more lengthy bareboat charter party or agreement for the charter of the M/V CAPTAIN HORNBLOWER on 17 February 1981, dated 17 February 1981 and containing, at the bottom of the second page, a crew hire and expense agreement. Again, both parts of this document were signed on 17 February 1981. The record also contains copies of the billing for these cruises. Of significance, Hornblower Yachts billed Gorman Publishing Co. for the use of the boat, the insurance and fuel, the services of the "captain," and the food provided each day.

Miss Peggy Petrovich, the representative of Gorman Publishing Co., who arranged for the charters, testified by deposition. She stated that she made all the arrangements for the tour with Hornblower Yachts and its predecessor, Hornblower Tours, and that Hornblower Yachts made all of the arrangements for the "captain," the crew, and the food, and that she paid Hornblower Yachts for all of these things. She stated that the charter parties, the agreements previously described, "were presented to me or Harry Stagnito as we boarded the boat each one of these nights." In response to the question, "Was it your understanding that your use of the M/V CAPTAIN HORNBLOWER was to be a bareboat charter of the M/V CAPTAIN HORNBLOWER?" she responded: "Previous to the charter, no. I did not know about the term "bareboat charter." She stated that this was explained to her only after the fact by Hornblower Yacht employees. She stated that she was not advised that as a bareboat charterer she was solely responsible for, and in control of, the operation of the M/V CAPTAIN HORNBLOWER and that she did not accept this responsibility as her obligation under the charter. She did not consider Gorman Publishing Co. to be a bareboat charterer of the M/V CAPTAIN HORNBLOWER. She did understand that the Operator of the M/V CAPTAIN HORNBLOWER would take her group where they wanted to go and bring them back when they wanted to come back.

Mr. Harry Stagnito also testified by deposition. He stated that he had nothing to do with the contractual arrangements for the vessel, although he signed the final contract at the time of

boarding. He stated that he did not know whether the use of the M/V CAPTAIN HORNBLOWER was to be as a bareboat charter or not. He stated that he was a "host, and had nothing to do with the contract." He further stated that it was not explained to him that as a bareboat charterer he was to be solely responsible for and in control of the operation of the M/V CAPTAIN HORNBLOWER, and that he did not accept this responsibility. He stated that he was never advised that the Operator of the M/V CAPTAIN HORNBLOWER was to be under his control and supervision although he asked him to go certain places and he did so. When asked whether the Operator had indicated to him his awareness that the vessel was being used as a bareboat charter, he responded, "I don't think so. To be honest, I still don't know what a bareboat charter is, so I don't think so."

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

1. The Administrative Law Judge erred in failing to find that the M/V CAPTAIN HORNBLOWER was under a bareboat charter to Gorman Publishing Co. on the evenings of 16 and 17 February 1981.

2. Those on board the M/V CAPTAIN HORNBLOWER on 16 and 17 February were guests rather than passengers and therefore there was no violation of 46 U.S.C.390c(a).

3. The specification alleging misconduct on 17 February 1981 is invalid because the charges were served before the vessel got underway.

4. The sanction is excessive.

APPEARANCE: Ronald Lovitt, Esquire, of Lovitt and Hannan Incorporated, Agricultural Building, Embarcadero at Mission, San Francisco, California, 94105.

#### OPINION

##### I

Appellant asserts that the Coast Guard must find the charter party for the M/V CAPTAIN HORNBLOWER on 16 and 17 February 1981 to be a bareboat charter because the charter agreement so describes it. I do not agree.

Were the wording of the charter party signed between a vessel's owner and the charterer conclusive of the type of charter

without regard to the surrounding circumstances, every owner of a small passenger carrying vessel could escape the inspection requirements by simply writing all of its charter parties in the form of bareboat charters. This would not be consistent with Congress' intent under the laws requiring Coast Guard inspection of small passenger carrying vessels. Such charter parties should be interpreted in the light of the surrounding circumstances and the manner in which they are treated by the parties.

At the hearing, the Coast Guard Investigating Officer took the position that the charter was not, in fact, a bareboat charter. Appellant argued that it was. This question was, therefore, a question of fact to be resolved by the Administrative Law Judge. I have often stated:

It is the function of the Judge to evaluate the credibility of witnesses in determining what version of events under consideration is correct. Appeal Decision 2097 (TODD). The question of what weight is to be accorded the evidence is for the judge to determine, and unless it can be shown that the evidence on which he relied was inherently incredible, his findings will not be set aside on appeal. O'Konn v. Roland, 247 F. Supp. 743 (S.D.N.Y. 1965).

APPEAL DECISIONS 2333 (AYALA), 2302 (FRAPPIER), 2116 (BAGGETT). Since, as discussed below, the Administrative Law Judge's determination that the charters were, in fact, not bareboat charters is reasonable, based on the evidence, it will be upheld.

The charter parties for the evenings in question, on their faces, describe bareboat charters. The evidence surrounding these voyages, however, supports the Administrative Law Judge's determination that they were not, in fact, bareboat charters. Miss Peggy Petrovich and Mr. Harry Stagnito, who represented Gorman Publishing Co. for the cruises in question, did not understand the charter arrangements to be bareboat charters and first learned that Hornblower Yachts so interpreted them as they boarded the vessel on the evenings in question.

In addition, Hornblower Yachts did not treat Gorman Publishing Co. as a bareboat charterer. Under a bareboat charter, the vessel is passed to the charterer for his use and control as if he were the owner. The booking sheet, included in the record, indicates that at the time the order was taken, Hornblower Yachts made all of the arrangements for the crew and for the food and entertainment to be provided in connection with the cruise. By Appellant's own testimony, he was hired through Hornblower Yachts and had no contact with the charterer, Gorman Publishing Co., until he met

those going on the cruise at the designated place on the evening of the charter. It was at that time that the bareboat charter party was first mentioned and signed.

The pre-printed information on the booking sheet is also probative. It indicates that complete parties are provided with entertainment and food. This is less consistent with a bareboat charter arrangement than with passengers carried for a pleasure cruise in which the vessel is operated by Hornblower Yachts. In addition, Appellant testified that, except for the bareboat charter party which was signed at the pier in this case, the arrangements made for the other vessel, M/V ADMIRAL HORNBLOWER, which was an inspected passenger vessel, were essentially the same as those made for the M/V CAPTAIN HORNBLOWER for which the bareboat charter party was used.

The evidence, thus, is sufficient to support the Administrative Law Judge's determination that the charter arrangement was, in fact, not a bareboat charter. Since his determination is reasonable, based on the evidence, it will not be disturbed.

## II

Appellant next urges that those on board the M/V CAPTAIN HORNBLOWER were guests and not passengers. Appellant's argument is dependent upon the existence of a valid bareboat charter. Since, as discussed above, there was not in fact a valid bareboat charter, Appellant cannot prevail here.

Appellant argues that all those on board the vessel were present as guests of Gorman Publishing Co. Although this is clear from the evidence, it does not help Appellant. Since Gorman Publishing Co. was not a bareboat charterer, the relevant question is the relationship of those on board the vessel to Hornblower Yachts, rather than to Gorman Publishing Co. It is equally clear that with respect to Hornblower Yachts, those on board the vessel were not guests or in any other category other than passengers under the definitions in 46 U.S.C. 390. They were, therefore, passengers.

Appellant further argues that the passengers provided no compensation for their carriage. He argues that they were, therefore, not passengers for hire. However, the definition in 46 U.S.C. 390 contains no requirement that a passenger be carried for hire in order to be a passenger. A passenger is anyone aboard the vessel other than members of the other groups listed.

## III

Appellant urges that the specification alleging misconduct for carrying passengers without a valid certificate of inspection on 17 February 1981 should not be upheld because the charges were served before the voyage in question. I do not agree.

At the time the charges were served, the passengers had already embarked on the vessel. It is true that the vessel was still moored to the dock; however, this is not relevant. The violation occurred as soon as the passengers were embarked. The fact that the charges were served before the violation had ended is immaterial.

Even if the violation had not occurred until the vessel left the pier, this would not provide cause to dismiss the specification alleging carriage of passengers without a certificate of inspection on 17 February. Appellant argues at length from cases holding that a grand jury indictment may not be rendered until the offense has occurred. However, charges served by a Coast Guard Investigating Officer are neither a grand jury indictment nor subject to the same laws. Since, in this case, the offense charged was clearly being committed at the time the charges were served, and was actually completed immediately thereafter, neither the remedial purpose of these suspension and revocation proceedings nor the intent of Congress in authorizing these proceedings would be served by dismissing a specification because the charges were served prior to completion of the offense.

#### IV

Appellant argues that the sanction imposed is excessive. I do not agree.

Appellant states that the sanction ordered exceeds that provided for by the Scale of Average Orders. The scale of Average Orders, 46 CFR Table 5.20-165, is not binding on the Administrative Law Judge by the terms of the regulation itself. The proper sanction is to be determined by the Administrative Law Judge based on the circumstances in each case. 46 CFR 5.20-165(a). Therefore, the fact that the sanction ordered may depart from that listed in the Scale of Average Orders is not cause to change it.

Appellant further urges that the sanction should be reduced because he was, at meet, an unintentional violator of the statutory provisions requiring a certificate of inspection for carriage of passengers. There is, however, sufficient evidence to support the Administrative Law Judge's determination that Appellant knowingly and intentionally engaged in these violations. His own testimony establishes that Appellant was aware that there was a dispute between the Coast Guard and Hornblower Yachts regarding the



legality of the operation of the M/V CAPTAIN HORNBLOWER. He further testified that cruises aboard the M/V CAPTAIN HORNBLOWER, an uninspected vessel, were carried on in substantially the same manner as those aboard the M/V ADMIRAL HORNBLOWER, which had a certificate of inspection. Appellant does not assert that he attempted to clarify the status of the M/V CAPTAIN HORNBLOWER with the relevant Coast Guard authorities or was misled by them. A licensed operator of a vessel is expected to ensure that it has the proper certificate of inspection and meets the legal requirements for the trade in which it is engaged. Appeal Decision 2308 (GRAY).

I find no reason to reduce the sanction ordered by the Administrative Law Judge.

#### CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the provisions of applicable regulations. the sanction ordered is appropriate under the circumstances.

#### ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 8 July 1982, is AFFIRMED.

B. L. STABILE  
Vice Admiral, U.S. Coast Guard  
VICE COMMANDANT

Signed at Washington, D. C., this 12th day of June, 1984.